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In The

Supreme Court of the United States

October Term, 1996

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, and GEORGE PICKENS, JR.,

Petitioners,

vs.

DOANE PRODUCTS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners' designation of Question Presented No. 1 is argumentative and does not comply with Supreme Court Rule 21.1.(a). A more accurate formulation would be, whether there was any substantial evidence of any admission by a decision-maker of the respondent, that a promotion decision was based on race, so as to raise a genuine issue of material fact.

2. Is an employer entitled to summary judgment in a Title VII discrimination case if in the final analysis no reasonable jury could find for the employees upon the evidence upon which the case was submitted under Fed.R.Civ.P. 56?

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STATEMENT OF JURISDICTION

The Petitioners' Statement of Jurisdiction does not conform to Supreme Court Rule 21.1 (e)(i) and (ii). The date of the judgment sought to be reviewed is January 29, 1997 (Pet. App. 1a) and the date of the order denying petition for rehearing and suggestion for rehearing *en banc* was April 9, 1997 (*Id.*, p. 41a), not April 5, 1997 as stated on page 1 of the Petition. Respondent did not receive the Petition until July 14, 1997, and it was not accompanied by any form of certificate, affidavit, or other proof of service, nor has the Respondent since received any notice of service, filing, or written notice of docketing. As the last day for filing the Petition according to 28 U.S.C. § 2101(c) was July 8, 1997, Respondent has no way of knowing whether the Petition was timely filed under Supreme Court Rule 28.2. It was advised over the telephone by the Supreme Court Clerk's office that the Petition was docketed on July 18, 1997 as No. 97-116. Respondent has no further information as to filing or docketing.

RESPONSE TO THE STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate. To begin with, the Eleventh Circuit did not "adopt" the District Court's decision as petitioners allege. (Pet. 10.) Rather, it merely held, under 11th Circuit Rule 36-1(d), that the summary judgment granted in favor of respondent was supported by the record. (Pet. App. 29a, n.1.) That result could be based on any reasoning supported

by the record; it does not constitute an adoption of the district court's opinion.

Furthermore, Petitioners' recitation of the facts is incomplete and misleading. The centerpiece of Petitioners' argument is a statement alleged to have been made by Earl Clements, Respondent's Vice President of Production, at a grievance meeting in March of 1994. Petitioners state that "during the course of the meeting, a union member asked a question of Clements regarding Doane's discriminating against the black employees by holding them to higher educational requirements. Clements' reply was that they (the company) might have 'discriminated a little bit but we can correct that.' " (Pet. 5, citations omitted.) However, the amended affidavit of James Cunningham (Pet. App. 43a), which is the evidentiary source of Clements' alleged statement, merely states that Clements made the statement during the course of a grievance proceeding; it says nothing about anyone's being held to higher education requirements, and does not otherwise tie the alleged statement to the decision to promote Kenny Dees to QC Technician. Furthermore, the Petition repeatedly states, without citation, that Clements was "directly involved" in the decision to promote Dees. That is simply incorrect, and it is not in any way supported by the record. As reflected in the district court's Memorandum Decision (Pet. App. 25a, n.6) the decision to promote Dees was made by Steven Wawrzyniak, Respondent's Vice President of Technical Services, and Howard Nichols, the QC coordinator in Respondent's Birmingham plant. As reflected in the excerpts of Clements' deposition reproduced at pages 3 through 5 of the

petition, Clements' only involvement in the Dees promotion was temporarily to stay implementation of the decision already made by Wawrzyniak and Nichols pending investigation of a grievance filed by the union, and to deal with the union in the grievance procedure.

Additionally, Petitioners claim that they were "led to believe that a position as QC Tech was a 'stepping stone' to management with Doane . . . ." (Pet. 2.) The Petition fails to mention that the source of their information on that point was Harold Hilton, himself a Petitioner, who was not a member of Respondent's management but was instead a union official. (Pet. App. 33a.) Hilton's statement is incompetent as evidence. The Petition also neglects to mention that blacks were promoted to supervisory positions *without* experience as QC Techs (Pet. App. 19a), and that only two QC Techs were *ever* promoted to supervisory positions in the Birmingham plant. (Pet. App. 18a.) Furthermore, the only other Birmingham plant QC Tech promoted into supervision was Arthur Kendrick, an African-American, who was promoted to QC Coordinator of Respondent's Manassas, Virginia plant.

Petitioners also misrepresent the qualifications of Kenny Dees, who received the promotion in question. Dees had a year of college and, contrary to representations in the Petition, had taken high school chemistry. (Pet. App. 33a.) More importantly, however, the Petition fails to mention that Dees had three years of experience with another pet food company working in a lab with similar equipment, including a Technicon infrared analyzer, the most sophisticated piece of lab equipment used by Doane QC Techs. (Pet. App. 33a.) In that job, Dees performed tests similar to those performed by

Doane's QC Techs, logged test results and other information, and calibrated the equipment. (*Id.*) None of the Petitioners had comparable education or experience.

Moreover, the undisputed facts in the record show that the standards Respondent required of its QC Techs were not lowered for Mr. Dees. Although the Petition fails to state just how the standards were lowered, Petitioners argued in the district court that they had been told that QC Techs would be required to have two years of college. (Pet. App. 15a.) That alleged statement, however, was made, if at all, prior to the 1983 execution of a written agreement settling a grievance over the QC Tech position and removing it (*Id.* at 15a and n.3) from the bargaining unit. Regarding qualifications, the settlement simply says "the company must have qualified quality control technicians including among other things, certain formal education in chemistry, etc." (Pet. App. 9a-10a.) The district court correctly held that the parol evidence rule precluded altering this settlement agreement by evidence of prior negotiations, and petitioners presented no evidence of a requirement adopted thereafter that QC Technicians have attended college. (Pet. App. 15a, n.3.) Dees clearly met the requirements set out in the settlement agreement. Moreover, the record clearly reflects that at least one black without college, Gerson Lee, became a QC Tech in 1987, after the settlement agreement but before the promotion of Dees. (Pet. App. 11a.)

Petitioners' statement that the company allowed whites to build a shower on the premises of the Birmingham plant when blacks had asked for a shower for years is also inaccurate. As reflected in the district court's Memorandum Decision, any request for a shower came

not from these Petitioners, but from the union as exclusive bargaining representative of the integrated bargaining unit and could not lawfully be made just for blacks (*Id.* at 20a). The union contract was in evidence and contained no promise to install or not to install a shower, leaving it a matter of management prerogative whether to provide one. Moreover, the shower was constructed without knowledge of management (Pet. App. 19a-20a); no black was ever denied the right to use the shower, or the right to have a key to it (*Id.* at 20a).

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that there was no genuine dispute of material fact and that Respondent was entitled to judgment as a matter of law. The 1983 grievance settlement removing the laboratory employees from the bargaining unit could not be varied by parol evidence of prior negotiations. The Petitioners do not argue that they made out a *McDonnell-Burdine prima facie* case. Petitioners failed to show any nexus between Earl Clements' conciliatory remark during the 1993 grievance procedure, and the motivation for any promotion decision; they did not offer any legally sufficient statistical evidence, and failed to show any failure to follow a decision of this Court or any conflict among the Circuits in this sort of case. The Petition fails to state any reason why the writ should be granted.

ARGUMENT

Petitioners first argue that the writ should be granted because there is a split in the circuits regarding the interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) in the context of a motion for summary judgment. That argument is meritless on the face of the Petition. As Petitioners correctly note, nine circuits have interpreted *Hicks* to mean that a *prima facie* case, coupled with evidence on which a reasonable jury could disbelieve the defendant's articulated nondiscriminatory reasons for the actions in question, is sufficient to defeat a motion for summary judgment. While there are *dicta* in *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) to the effect that such a showing is not always sufficient to support a finding of discrimination, the petition itself reflects that the *holding* in each of those cases is consistent with the holdings in the other nine cases cited. In *Woods*, a failure to hire case, the First Circuit held that summary judgment was proper because the plaintiff had completely failed to rebut the defendant's explanation that those hired were more qualified than he. In *Rhodes*, the court held that the evidence was in fact sufficient to support a jury verdict in favor of the plaintiff. Those holdings are in no way inconsistent with the holdings in the cases petitioners claim are on the other side of the alleged split. Moreover, in neither case was the *dictum* on which petitioners rely necessary to the *holding* in the case. Examining the question in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), the 11th Circuit stated as follows:

> The fact remains that the contrary dicta in the 1st and 5th Circuit decisions are just that: dicta. We have not found any holding of any circuit inconsistent with the holding of our *Hairston, Batey, Howard, Cooper-Houston* line of decisions, and at least eight other circuits have reached the same holding.

Id. at 1536.

In addition to the fact that there is no split in the circuits over application of *Hicks* to a case such as the present one, *Hicks* recognized that the role of the appellate court is no different in reviewing a judgment in a case to which the *McDonnell-Burdine* formula applies, than it is in any other civil case (509 U.S. at 524); including making the appropriate ruling in a case in which no reasonable jury could find intentional discrimination. The Circuits likewise recognize and follow this principle. *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1210 (11th Cir. 1997); *Fisher v. Vassar College*, ___ F.3d ___, 74 FEP Cases 109, 116, 132, 146 n.12 (2d Cir. 1997) (*en banc*).[1] There is simply

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[1] *Fisher v. Vassar College, supra,* was a Title VII, ADEA, and EPA case which was fully tried in a bench trial. The Court of Appeals for the Second Circuit, sitting *en banc,* held that once the defendant employer introduced evidence of a legitimate reason for denying tenure at such a trial, "the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant," drops out of the picture, and is not to be resurrected later. The district court found that Vassar's asserted reasons were not the real reasons for denying her tenure, and that the real reason was intentional discrimination because of her age and status as a married woman. Although the panel decision of the Court of Appeals and the majority of the *en banc* court ruled that it could not find clear error in the district court's determination that certain of Vassar's assertions about

no evidence that the Respondent's decision makers did not believe they were selecting the best qualified person available for the QC Tech vacancy these six Petitioners say was wrongly filled. The Petitioners repeatedly said they did not want the job, they would not accept it if offered, that they would not last five minutes if selected, and some gave management the impression that they were anti-management and had said they would not accept a job outside the bargaining unit (Pet. App. 18a). Scant wonder that the district judge had the *déjà vu* feeling that the claim really being presented was the

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its decision were untrue, it found the totality of the evidence was insufficient to support the district court's finding that Vassar actually discriminated against Fisher on the basis of her age or her status as a married woman, basing its authority to do so on this passage of *St. Mary's Honor Center v. Hicks:*

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the fact-finder to answer, subject, *of course,* to appellate review – which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). *Id.* at 524. (Emphasis the Supreme Court's.)

Since jury trial is available in a Title VII case under the 1991 amendments, the review of a jury verdict would be under the standard of whether any reasonable jury could find as the particular jury did. The present case does not involve the possible conflict in the circuits occasioned by the *Vassar College* case because this case was not fully tried and the question whether a prima facie case had been made had not dropped out of the case and there was no genuine issue of material fact as to pretext.

arbitration case all over again, seeking return of the laboratory employees to the bargaining unit. (Pet. App. 6a.) No matter how scrupulously one applies the *McDonald-Burdine* formula, in the final step in that reasoning process, there is simply no basis in the record on which a reasonable person could find Respondent discriminated against these six Petitioners in filling the QC Tech vacancy as it did.

Whatever the views of the various Circuits, the *Hicks* holding is inapplicable to this case, once again on the face of the Petition. *Hicks* held that the "fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." 509 U.S. at 511. The *Hicks* holding, therefore, does not even come into play unless the plaintiff has established a *prima facie* case of discrimination. Here, however, the Petition itself states that "the district court dismissed the action and held that the appellants did not present a *prima facie* case because they all did not 'apply' for the QC Tech position" (Pet. 6), and then states that "appellants will not argue, at this stage, the *existence* of the *prima facie* case itself based on the authority of *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983)." (*Id.* at n.4.) That is a gross misconstruction of *Aikens*, which applies only to cases "fully tried on the merits," 460 U.S. at 714, and has nothing to do with whether a plaintiff must show by materials meeting the requirements of Fed.R.Civ.P. 56 the elements of a *prima facie* case to survive a motion for summary judgment. As the *Hicks* holding is predicated on

the existence of a *prima facie* case, and Petitioners do not even contend that they established such a case, there is no basis for granting the writ based on *Hicks*.

Even if the Petitioners had made out a *prima facie* case, their arguments that they submitted evidence sufficient to show pretext are meritless. As detailed in the Response to the Statement of the Case, *supra*, Respondent's articulated reason for promoting Dees was his excellent qualifications for the job, which none of the Petitioners possessed. Indeed, a statement of their qualifications is conspicuously absent from the Petition. Moreover, the "evidence" which they contend is sufficient to show that Respondent's articulated reason for promoting Dees was a pretext for discrimination simply will not bear inspection. As detailed in the statement of the case, Earl Clements' conciliatory statement in the March, 1994 grievance meeting is not evidence of discrimination with regard to the Dees promotion because there is no evidence that the statement was made in connection with the decision to promote Dees, and in any event, Clements was not a decisionmaker with respect to the Dees promotion. The evidence regarding the shower similarly is not probative of discriminatory animus: The record reflects without contradiction that any alleged request for a shower came from the union, as exclusive bargaining representative of the biracial bargaining unit, rather than from Petitioners; that the union contract contains neither a promise to install nor a promise not to install a shower, leaving it to management prerogative whether to install a shower available to members of both races, that the shower was constructed without the knowledge of management, and that no black was ever refused its use or

access to it. The response to the statement of the case also reflects the fallacy in petitioners' assertion that respondent lowered the QC Tech qualifications set out in the 1983 grievance settlement for Dees.

Petitioners also argue that "a noted animosity between the labor unit and the management" indicates pretext. That argument is a *non sequitur*. Petitioners do not even bother to argue, much less produce admissible evidence, that the alleged animosity was based on race. The bargaining unit has been racially integrated for decades. Animosity between labor and management is a common phenomenon in industry all over the world, regardless of ethnic considerations, and its existence is not probative of racial animus. Finally, Petitioners' statistical argument, based on the racial makeup of Respondent's workforce, is without probative significance because no attempt was made to introduce evidence of the racial composition of the qualified persons in the applicable labor market. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989).

As the foregoing demonstrates, to the extent that the *Hicks* decision is applicable to the instant case, the district court properly applied that decision. It simply determined that there was insufficient evidence to support a finding of discrimination based on the lack of a *prima facie* case and, even if such case were established, the lack of evidence that the articulated reason for promoting Dees, namely that the QC Coordinator Nichols and Vice President for Technical Services, Wawrzyniak, believed Dees was best qualified, was a pretext.

CONCLUSION

Respondent respectfully submits that Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that there was no genuine dispute of material fact and that Respondent was entitled to judgment as a matter of law.

Respectfully submitted,

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